

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION  
OPIATE LITIGATION**

THIS DOCUMENT RELATES TO:

*Montgomery County Board of County  
Commissioners & the State of Ohio Ex. Rel.  
Mathias H. Heck, Jr., Prosecuting Attorney  
v. Cardinal Health, Inc. et al.,  
Case No. 1:18-op-46326-DAP*

**MDL No. 2804**

**Case No. 17-md-2804**

**Judge Dan Aaron Polster**

**PHARMACY DEFENDANTS' MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS  
SUPPLEMENTAL COMPLAINT**

Plaintiff Board of County Commissioners of Montgomery County, Ohio, by and through the Montgomery County Prosecutor's Office (the "County"), is proceeding with its common law public nuisance claims against Pharmacy Defendants. No. 17-md-2804, Doc. 3734 at 1, 7. For reasons previously briefed in the Track One and Track Three proceedings, the Court should dismiss the County's common law public nuisance claims under Federal Rules 12(b)(1) and 12(b)(6).

To avoid redundant briefing, Pharmacy Defendants respectfully submit that this Court erred in rejecting their previously raised arguments and hereby incorporate them to preserve them for appellate review. *See, e.g.*, No. 17-md-2804, Doc. 497 (Pharmacy Defendants' motion to dismiss); Doc. 491 (Distributor Defendants' motion to dismiss); Doc. 1874 (Pharmacy Defendants' motion for summary judgment on statute of limitations); Doc. 1883 (Pharmacy Defendants' motion for summary judgment on preemption); Doc. 1885 (Pharmacy Defendants' motion for summary judgment on causation); Doc 2159 (opposition to Track One Plaintiffs' motion for partial summary adjudication of Defendants' duties under the Controlled Substance Act ("CSA")); Doc. No. 3340 (Pharmacy Defendants' motion to dismiss). Without limitation, arguments incorporated and preserved include:

- The County lacks Article III standing to sue for indirect injuries incurred in the first instance by third parties not before the Court.
- The Ohio Product Liability Act abrogates the County's public nuisance cause of action. Ohio Rev. Code § 2307.71(A)(13).
- Ohio law does not permit a common law public nuisance claim based on a pharmacy's alleged failure to detect and prevent the diversion of drugs of abuse. The Ohio legislature has comprehensively regulated the field of controlled substance dispensing and distribution, and has provided only for injunctive relief against a pharmacy. *See* Ohio Rev. Code § 4729.35.
- The County's claims are preempted by federal law, including CSA provisions that give DEA discretion to enforce the dispensing and distribution-related provisions of that law.

- The derivative nature of the County's injuries defeats proximate cause.
- The County cannot establish proximate cause because liability is cut off by numerous intervening factors, including intervening unlawful conduct.
- The County cannot establish proximate cause given the role of doctors as learned intermediaries.
- The economic loss doctrine bars the County's claims.
- The statewide concern doctrine bars the County's claims.
- The County's claims for public nuisance fail because they do not allege interference with a public right.
- The County's claims for public nuisance fail because they are directed at authorized and regulated activities.
- The County's claims for public nuisance fail because there is no enforceable duty to monitor and halt apparently suspicious orders before shipping.
- The claims must be dismissed to the extent they seek to establish liability based on unlawful conduct with respect to the dispensing of prescription opioid medications. The responsibility to guard against the dispensing of illegitimate prescriptions falls on the individual pharmacists who must exercise their professional judgment when they are presented with a prescription. Neither the CSA nor equivalent Ohio law impose relevant corporate-level dispensing duties. Pharmacy-operating corporations cannot make the types of judgments entrusted exclusively to professional pharmacists under federal and state law. And the County comes nowhere close to adequately alleging that any of Pharmacy Defendants' pharmacists engaged in unlawful dispensing conduct that would support a claim under Ohio's public nuisance doctrine.
- The County's claims are barred by the applicable statute of limitations.

For the foregoing reasons, the County's public nuisance claims against Pharmacy Defendants should be dismissed with prejudice. Pharmacy Defendants expressly reserve all challenges to the County's additional causes of action, which will be briefed, if necessary, at a later time to be set by the Court.

Dated: June 18, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record on June 18, 2021.

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